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No. — 37

In the Supreme Court of the United States

OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KING PACKING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Department of Justice,
Washington 25, D. C.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Question presented	2
Statement	2
Reasons for granting the writ	5
Conclusion	15
Appendix A	1a
Appendix B	11a

CITATIONS

Cases:

Alstate Construction Co. v. *Durkin*, 345 U. S. 13 — 13

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 — 9, 13–14

Ciemnoczolowski v. *Q. O. Ordnance Corp.*, 119 F. Supp. 793 — 14

Mitchell v. *Southeastern Carbon Paper Co.*, 124 F. Supp. 525 — 14

Steiner v. *Mitchell*, 215 F. 2d 171, pending on petition for a writ of certiorari, No. 465, this Term — 5, 6, 13, 14

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Act of 1949, c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

Sec. 3 (o)	12, 16a
Sec. 7 (a)	11a
Sec. 11 (c)	11a
Sec. 15 (a) (1)	2, 12a
Sec. 15 (a) (2)	2, 12a
Sec. 15 (a) (5)	2, 12a
Sec. 16 (c)	13, 16a
Sec. 17	13a

332921—55——1

Statutes—Continued

	Page
Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251 *et seq.*)	
Sec. 2	9, 10, 14, 15a
Sec. 4	5, 9, 10, 14, 13a
Miscellaneous:	
93 Cong. Rec.:	
2124	7
2125	9
2126	9
2131	7
2179	11–12
2181	12
2293	7, 9
2295	9
2297	7
2298	8
2299	11
4389	10
General Statement as to the effect of the Portal Act of 1947 on the Fair Labor Standards Act of 1938, 12 Fed. Reg. 7655	13
H. R. 2157, 80th Cong., 1st Sess	7
H. Rep. No. 326, 80th Cong., 1st Sess	7
S. Rep. No. 48, 80th Cong., 1st Sess	7

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OPINIONS BELOW

The opinion of the district court (R. 11–14) is reported at 107 F. Supp. 369. The opinion of the court of appeals (App. 1a–7a) appears at 216 F. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1954. A timely petition for rehearing was denied on December 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat.

1060; c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), and the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251 *et seq.*), are set forth in the Appendix, *infra*, 11a–16a.

QUESTION PRESENTED

Knifemen employed in respondent's meat packing plant spend time, each workday, in sharpening the knives which they use in their jobs. This activity, which is indispensable to the performance of their duties (butchering and trimming meat), is required by the employer to be done outside the scheduled eight-hour shift. Respondent provides a room and equipment for its accomplishment.

The question presented is whether this activity is a "principal" activity compensable under the Fair Labor Standards Act, rather than a "preliminary" or "postliminary" activity within the meaning of the Portal-to-Portal Act.

STATEMENT

The Secretary of Labor brought this action to enjoin respondent from violating the overtime and record-keeping requirements of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as amended, in the employment of production workers, and from violating Section 15 (a) (1) of the Act by making interstate shipments of the goods produced by such workers.

The alleged violations of the Act (R. 3–8) arise from respondent's admitted failure (R. 8–11) to pay for or record the time spent by so-called knifemen, employed on its killing floor and in its cutting or trimming room, in sharpening the knives which they use in the performance of their work.

Respondent is an interstate meat packer (complaint, para. IV, R. 4; answer, para. IV, R. 9) engaged in slaughtering, butchering, dressing, and distributing meat and meat products. At its packing plant, it employs 70 to 80 persons, including 21 to 24 knifemen whose compensation rights are involved in this litigation. The knifemen perform various butchering operations, 12 or 14 of them working in the killing room and the remainder in the cutting room. Fdg. IV, R. 16. Under the terms of their employment, the knifemen supply certain types of knives which they use in their work, while other types are furnished by King Packing Company (App. 1a). The men are required to "sharpen their own knives outside the scheduled shift of eight hours and for this activity [they] are not compensated" (App. 2a; also, Fdg. VII, R. 17). "While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make

it impracticable to do so during shift hours" (App. 2a).[1]

Respondent provides a room, outfitted with an emery wheel and grindstone, where the knife-sharpening is performed (App. 2a). This work is ordinarily done in the morning, before the scheduled shift, but it is sometimes done during the noon hour or after quitting time (R. 77, 87, 109).[2]

Knifemen are paid by the hour and, excluding the knife-sharpening time in controversy, they work eight hours a day, five days a week.[3]

The district court concluded that the principal activity which knifemen are employed to perform is "the killing, cleaning and cutting of carcasses"; that knife-sharpening is not a part of such principal activity but is merely "preliminary" or

[1] Respondent's production manager testified that company-owned knives are sharpened "some during working hours and some on their own [the knifemen's] time" (R. 74; see, also, R. 51). Keeping all knives sharp, as he pointed out, is essential to efficient production, which is conducted on an assembly-line basis. R. 45–46, 51–53, 55–56, 79.

[2] An employee is free to take his own knives home at the end of the workday and, assuming that he has the necessary equipment, to sharpen them before returning to work the following day. This is rarely done in practice, one reason being that the knife might have its edge dulled in the process of being carried back and forth. See R. 137, 80.

[3] In addition to knife-sharpening, knifemen must repeatedly steel their tools throughout the workday. This activity is done on company time and is compensated for. App. 2a.

"postliminary"; and that it is accordingly excluded from coverage under the Fair Labor Standards Act by Section 4 (a) (2) of the Portal-to-Portal Act (R. 19). It therefore ordered the action dismissed (R. 22).

The court of appeals affirmed, holding that even if knife-sharpening were "indispensable to" or an integral part of the butchering work, it was nonetheless "preliminary" and beyond coverage (App. 4a–5a). In reaching this conclusion, it recognized that *Steiner* v. *Mitchell*, 215 F. 2d 171 (C. A. 6), pending on petition for a writ of certiorari (No. 465, this Term), supports the opposite view.

REASONS FOR GRANTING THE WRIT

Section 4 of the Portal-to-Portal Act makes "preliminary" and "postliminary" activities noncompensable under the Fair Labor Standards Act. It also expressly preserves the compensability of "principal activities." These critical statutory terms are undefined.

The court below applied a test based solely on the time factor. It concluded that the work involved was "preliminary" or "postliminary" because it was performed before or after the performance of work on the production line. The effect of this approach, as the court recognized, is to hold that an activity which has a direct and necessary functional relationship to work on the production line is noncompensable if performed off-shift.

While "preliminary" and "postliminary" are words which imply a time relationship, the term "principal" is one which focuses upon the nature and importance of the activity concerned. The latter term suggests, and legislative history and related statutory provisions confirm, that it was the purpose of Congress to exclude off-shift activities which are only incidentally related to the job but to preserve coverage of activities which, though they are performed outside the employee's hours on the production line, are indispensably and functionally related to the productive work for which the employee is hired. For these reasons, the Court of Appeals for the Sixth Circuit concluded, in *Steiner* v. *Mitchell,* 215 F. 2d 171, now pending on petition for a writ of certiorari (No. 465), that men working with toxic materials in a battery plant were entitled to compensation for time spent in clothes-changing and showering.* That court held that a "principal activity" includes activities which are "an integral and indispensable part of a principal activity," even though performed before or after engagement in work on the production line. See 215 F. 2d at 175. The court below considered the *Steiner* decision and expressly rejected the Sixth Circuit's interpretation of the statute. In this, we believe it erred. The conflict, moreover, is one which should be resolved by this Court.

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*For a full statement of the facts of that case, we respectfully refer the Court to the memorandum filed by the Government in No. 465.

1. The accompanying Senate Report stated that it is the purpose of Section 4 of the Portal-to-Portal Act (App. 13a–15a) to preserve the compensability of "all activities which are an integral part" of a "principal activity" (S. Rept. No. 48, 80th Cong., 1st Sess., p. 48). As Senator Cooper, one of the sponsors of the legislation,[5] explained on the floor (93 Cong. Rec. 2297):

> We believe that in the use of the words "principal activity" we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity.

After giving the above explanation of the term, Senator Cooper was asked the following question by Senator McGrath (*ibid.*):

> Mr. McGrath. I think that at this point we might very definitely make contribution to the legislative history of what we are doing here. Am I correct in understanding

[5] Though the Portal Act had its origin in a bill introduced by Congressman Gwynne (H. R. 2157), Section 4, the provision here involved, was added by the Senate. The original Gwynne bill contained no comparable section (H. Rept. 326, 80th Cong., 1st Sess., p. 12). Senator Cooper was a member of a three-man subcommittee of the Committee on the Judiciary which conducted hearings on the measure (93 Cong. Rec. 2124) and formulated the Senate version (93 Cong. Rec. 2131; 93 Cong. Rec. 2293).

332921—55——2

> the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?

Senator Cooper answered by giving two examples of what he meant by an integral part of a principal activity. Thereupon, Senator McGrath posed the case of a worker in a chemical factory whose duties require him to put on special clothing at the beginning of the workday and to shower at its conclusion—a type of activity which is indispensable and which must necessarily be performed while the employee is off the production line. The colloquy is as follows (*id.*, p. 2298):

> Mr. McGRATH. There are innumerable instances of operations which have to be performed that are not covered in these two particular examples. I think of one at the moment. In certain of our chemical plants workers are required to put on special clothing and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?
>
> Mr. COOPER. I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of ac-

> tivity which we consider compensable and the type which should not be compensable. *In accordance with our intention as to the definition of "principal activity," if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity.* On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable. [Emphasis added.]

The history of the Portal-to-Portal Act shows further that a careful and purposeful distinction was drawn between Section 2 (which provided, *retrospectively,* that an employer would not be liable for back pay unless the compensability of the activity concerned had been fixed by contract or established custom; see App. 15a) and Section 4 (which relates to *future* rights of compensation). The aim of Section 2 was to wipe out the large number of "existing portal-to-portal cases" which had been filed following this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. See 93 Cong. Rec. 2125, 2126, 2293, 2295. As Senator Donnell explained (*id.*, pp. 2125–2126):

> But the real purpose of this proposed legislation [Section 2] is to dispose of the

> existing portal-to-portal cases, and *we do not see any way to do except to take the entire activities of the entire 24-hour day, and provide by law that none of them shall be compensable unless by contract or custom.*
>
> * * * * *
>
> I should say that recognizing the grave economic problem, what we do is to undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so. *In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable.* [Emphasis added.]

On the other hand, as stated above, Section 4 preserves the compensability of the "principal activity or activities" an employee is engaged to perform, and makes noncompensable only those activities which are "preliminary" and "postliminary." The "key words" in Section 4, as pointed out by Congressman Walter (one of the House managers when the bill went to conference), are "principal activity or activities" (93 Cong. Rec. 4389). By omitting these words from Section 2 and including them in Section 4, Congress provided a strict rule for past claims and a different and more liberal rule for the future. This is emphasized by the following colloquy be-

tween Senator Pepper and Senator Cooper (93 Cong. Rec. 2299):

> Mr. PEPPER. The Senator has referred in his discussion with the Senator from Rhode Island to page 48 of the report of the committee, where there are set forth two instances of activities which are so interrelated to principal activities that they could be construed as principal activities and therefore compensable.
>
> * * * * *
>
> If I correctly understand the Senator, those incidental activities are to be construed under [the] part * * * of the bill dealing with *future claims as compensable work,* as principal activities.. Is that correct?
>
> Mr. COOPER. Excluding the use of the word "incidental." I do not think those activities are incidental. I think they are an integral part of the employment.
>
> Mr. PEPPER. I should like to ask the able Senator from Kentucky: Would workers who *have been* engaged in such activities as we have just been discussing be precluded under [the] part * * * of the committee bill, dealing with *existing* claims, from recovery for such work?
>
> Mr. COOPER. Exactly. [Emphasis added.][6]

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[6] Senator Donnell's explanation of the bill likewise draws a careful distinction between past claims (Section 2) and future rights (Section 4):

"Mr. President, we were discussing part II of the bill. I may say, as previously indicated, that part II relates to

2. The Fair Labor Standards Amendments of 1949 confirm the view that the Portal-to-Portal Act does not automatically exclude from coverage all activities performed outside the hours spent on the production line. Thus, new section 3 (o) (App. 16a) provided that in computing hours of employment "there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the

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existing claims. The purpose of part II is to deal solely with claims which exist at the time of the enactment of the pending measure.

"The Senate will observe in due time that *the approach which we make in the bill is quite different in the case of existing claims as contradistinguished from claims arising in the future.*" (93 Cong. Rec. 2179.)

* * * * *

"Mr. President, I have analyzed part II of the act, which relates, as I have indicated, to existing claims. *I now come to part III, which relates to future claims. Here, as I have indicated, we have approached the subject matter from quite a different angle.* We have taken the position under part II that in the first place we should extinguish, cancel, annul, and make unenforcible the collection of moneys in portal-to-portal suits. * * *" (93 Cong. Rec. 2181.)

* * * * *

"I was about to proceed to part III, which relates to future claims, that is to say, which governs employees in their relations with the employers after the enactment of this legislation. It determines what activities are compensable and what are not.

"Mr. President, here we have come to the conclusion that we do not legislate as to the entire 24-hour period, for if we do it may well be, and in fact will be, that we shall have legislated out of existence some claims which may bring about an injustice to the plaintiffs therein." (93 Cong. Rec. 2181). (Emphasis added.)

week involved by the express terms of or custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." The exclusion, in certain defined circumstances, of clothes-changing and showering activities demonstrates that, in other circumstances, these activities may meet the test of compensability. See *Steiner* v. *Mitchell, supra,* 215 F. 2d at 173.

Moreover, Section 16 (c) of the 1949 Amendments (App. 16a) declares that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect." Outstanding at the time was the Administrator's interpretation that certain "preparatory activities [those which are "closely related" to a principal activity and "indispensable to its performance"] which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act * * *." See *General Statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938,* p. 13 (12 Fed. Reg. 7655).[7]

3. The court below gave weight to the fact that this Court, in the *Mt. Clemens* case, used the descriptive term "preliminary" in referring to

[7] Compare *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, 16–17, in which the Court placed reliance upon Section 16 (c) and a prior administrative interpretation holding that a particular activity constituted the production of goods "for commerce."

a variety of activities, including the assembling and sharpening of tools (328 U. S. at 692–693). But this Court was not using the word as a term of art or construing it as a statutory term. And the meaning which Congress subsequently ascribed to the words "preliminary" and "principal" is to be derived from the legislative history which we have discussed above. Moreover, to assume, as did the court of appeals (App. 9a), that Congress broadly proposed to make *permanently* noncompensable all of the activities which this Court passingly described as "preliminary" in the *Mt. Clemens* case is to overlook the basic distinction, fully recognized by the Sixth Circuit in *Steiner,* 215 F. 2d at 173, between Sections 2 and 4: That a broad, exclusionary standard was adopted in relation to suits for back pay pending in 1947 (Section 2) and a discrete, more liberal, set of criteria for future rights of compensation (Section 4).

4. The issue of statutory interpretation on which the Sixth and Ninth Circuits have expressly differed is one of importance to the administration and enforcement of the Fair Labor Standards Act.[8] If, as held by the court below,

[8] Cases involving the interpretation of "principal" activities under the Portal Act are now pending before two other courts of appeals. *Ciemnoczolowski* v. *Q. O. Ordnance Corp.*, 119 F. Supp. 793 (D. Nebr.), on appeal to the Eighth Circuit, and *Mitchell* v. *Southeastern Carbon Paper Co.*, 124 F. Supp. 525 (N. D. Ga.), on appeal to the Fifth Circuit.

the words "preliminary" and "postliminary" exclude an activity performed off-shift, no matter what its importance and its functional relationship to the employee's performance of his job, a wide variety of significant employee activities in numerous industries fall outside the Act. If, on the other hand, as held by the Sixth Circuit, the term "principal" encompasses an off-shift activity which is integrally and indispensably related to the performance of the job, these same activities come within the law's protection. This difference in the interpretation of the governing criteria is one which should be resolved by this Court for the guidance of employer and employee alike.

CONCLUSION

It is respectfuly submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor, Department of Labor,
Washington 25, D. C.

MARCH 1955.

332921—55——2

APPENDICES

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 13540

Oct. 21, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

KING PACKING COMPANY, A CORPORATION, APPELLEE

Appeal from the United States District Court for the District of Idaho, Northern Division

Before: ORR and POPE, Circuit Judges, and YANKWICH, District Judge.

ORR, Circuit Judge:

King Packing Company, a corporation, hereafter King Packing, operates a meat packing plant near Nampa, Idaho. It employs twelve or fourteen knifemen on its killing floor and nine or ten in the cutting room. These employees are employed on a regular eight-hour shift, five days a week, with an hour off at noon and a five minute rest period both morning and afternoon. The men are compensated at hourly rates. Certain of the knives used by the men are furnished by King Packing. All other knives used by each employee are owned and furnished by him. This is a requirement incident to employment. It is a rule at the plant and a custom and usage in force

there that the men sharpen their own knives outside the scheduled shift of eight hours and for this activity the men are not compensated. While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make it impracticable to do so during shift hours. A room for sharpening, in which there is an emery wheel and grindstone, is furnished by King Packing. In order to keep the edge on the blade throughout the shift the men frequently steel their knives. This operation, which is a distinct process from sharpening with whetstone, emery wheel and grindstone, is performed on company time and compensated for.

The Secretary of Labor brought an action in the District Court seeking to enjoin King Packing from alleged violations of the Fair Labor Standards Act. His complaint is bottomed on the failure to compensate for knife sharpening. King Packing contends that this time is not required to be recorded or paid for because of the provisions of Section 4 of the Portal-to-Portal Act of 1947 regarding "preliminary" or "postliminary" activities. A solution of the question posed requires a determination of whether the knife sharpening operations performed by the employees before starting or after concluding the regular eight-hour shift were "preliminary" or "postliminary" to the principal activity or activities performed by the men. The relevant portions of the controlling statutory provision, § 4

of the Portal-to-Portal Act, are set forth in note 1.[1]

The Supreme Court of the United States, in the case of *Anderson* v. *Mt. Clemens Pottery Co.*,

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[1] Section 4 of the Portal-to-Portal Act of 1947, 29 U. S. C. A. § 251, et seq., so far as here relevant, provides as follows:

"Sec. 4.

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

328 U. S. 680, 692–93, gave examples of various activities which it termed "preliminary." One of these examples was "assembling and sharpening tools," the identical activity with which we are concerned in the instant case. The Portal-to-Portal Act was passed by Congress subsequent to the decision in the *Mt. Clemens* case with the purpose in mind, among other things, of making non-compensable certain preliminary activities, which the *Mt. Clemens* case had held to be compensable. See Part I of the Portal-to-Portal Act of 1947, Findings and Policy; H. R. Rep. No. 71, 80th Congress, 1st Session (1947). Sections 2 and 3 of the Act deal with then existing claims which particularly prompted its enactment, while section 4 deals with future claims such as those involved in the instant case. If our conclusion that Congress enacted the Portal-to-Portal Act for the purpose of making non-compensable certain activities held to be compensable in the *Mt. Clemens* case, and in so doing used the term "preliminary" in the same sense that the Supreme Court of the United States used it, is valid, then "assembling and sharpening tools" is a "preliminary" activity. Knives used in the King packing plant are tools and knives were what the employees were sharpening.

The Secretary argues that the sharpening of knives is not "preliminary" or "postliminary" but rather "an integral part of a principal activity," since it is indispensable to the proper performance of the employees' work. He relies on a statement by Senator Cooper, one of the sponsors of the Portal-to-Portal Act, made during Senate debate on the bill that the term "principal

activities" is "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work." The case of *Steiner, et al.* v. *Mitchell,* 6 Cir., No. 11934, decided August 10, 1954, supports this contention. In our view the terms "preliminary" or "postliminary" cannot be interpreted so as to exclude all activity "indispensable to the performance of productive work." To do so would deny effect to the intended meaning of the Portal-to-Portal Act. All of the activities designated as "preliminary" by the Supreme Court in the *Mt. Clemens* case can be considered indispensable. See *McComb* v. *C. A. Swanson & Sons,* D. Nebr., 1948, 77 F. Supp. 716, 733.

While, as we have said, section 4 of the Act is the controlling provision in this case, we have found it helpful in our construction of the meaning and intent of section 4 to consider cases which deal with section 2, although section 2, unlike section 4, does not explicitly refer to preliminary activities. Section 2 has been construed as referring to the activities involved in the *Mt. Clemens* case. In deciding cases under section 2 the courts have had occasion to describe various activities as principal or as preliminary. In suport of his contention that the knife sharpening involved in the instant case is a principal activity the Secretary relies on several of these cases.[2] These cases

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[2] *Biggs* v. *Joshua Hendy Corp,* 9 Cir. 1950, 183 F. 2d 515; *United States Steel Co.* v. *Burkett,* 4 Cir. 1951, 192 F. 2d 489, 491; *F. W. Stock & Sons* v. *Thompson,* 6 Cir. 1952, 194 F. 2d 493; *Central Missouri Tel. Co.* v. *Conwell,* 8 Cir. 1948, 170 F. 2d 641; *Glenn L. Martin Nebraska Co.* v. *Culkin,* 8 Cir. 1952, 197 F. 2d 981.

are distinguishable. The activities treated as principal in these cases were the same or very similar to activities which the employees performed throughout their working day.

Other cases arising under section 2 describe as preliminary the activities involved in the instant case, namely, the sharpening of knives used in a meat packing plant. *Market* v. *Swift & Co.*, 2 Cir. 1949, 173 F. 2d 517, 520; *Smith* v. *Cudahy Packing Co.*, D. Minn., 1947, 76 F. Supp. 575. The activities described as preliminary in still other cases are analogous to those here involved.[3]

The Secretary argues that there is in effect in the instant case an express provision of a written contract which prevents the employer from being relieved of liability under section 4. He relies upon the following provision in the collective-bargaining agreement in effect between King Packing and the Union. "All time worked over and above [eight hours a day and forty hours a week] shall be time and one-half." Section 2 as well as section 4 provides that an employer shall not be relieved of liability for activities made compensable by an express provision of a written contract. In so doing section 2 employs language identical to that used in section 4. In support of his contention that an express provision prevents the employer from being relieved of liability in the instant case, the Secretary relies on two cases arising under section 2: *Joshua Hendy Corp.* v.

[3] *Bayler* v. *Pressed Steel Car Co.*, 7 Cir. 1950, 182 F. 2d 357 (cleaning of firearms by guards); *Plummer* v. *Minneapolis-Moline Power Implement Co.*, D. Minn. 1948, 76 F. Supp. 745 (same); *Role* v. *J. Niels Lumber Co.*, D. Montana, 1947, 74 F. Supp. 812 (caring for tools used in logging operations).

Mills, 9 Cir. 1948, 169 F. 2d 898; *Frank* v. *Wilson & Co.*, 7 Cir. 1949, 172 F. 2d 712, cert. denied, 337 U. S. 918. Each of these cases is distinguishable. In the first an employee was required to attend to his regular duties during his so-called lunch period. In the second the contract provided for time and one-half compensation for "employees who are required to work over eight hours in any one day," and certain employees were required to be "punched in" five minutes before the regular shift time for which they were compensated.

At the time the contract providing compensation for "all time worked" was entered into by King Packing and the Union it was the custom and practice at the plant that time spent in sharpening knives was not compensated. This existing custom should be considered in interpreting the intent of the parties in employing general language as to "time worked." The custom in effect at the plant that time spent in knife-sharpening was non-compensable was continued after the execution of the contract without complaint on the part of the Union. In construing an agreement it is useful to consider the interpretation placed upon it by the parties. The continuation of the existing custom without complaint is most conclusive that the parties in the use of general language as to payment for overtime were referring to work performed outside the eight-hour shift but of the same character as the work usually performed within the regular shift.

Judgment affirmed.

(Endorsed:) Opinion. Filed Oct. 21, 1954.

PAUL P. O'BRIEN, *Clerk.*

United States Court of Appeals for the Ninth Circuit

No. 13540

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

KING PACKING COMPANY, A CORPORATION, APPELLEE

Judgment

Appeal from the United States District Court for District of Idaho, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Judgment filed and entered October 21, 1954.

PAUL P. O'BRIEN, *Clerk.*

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, December 10, 1954.

Before: ORR and POPE, Circuit Judges, and YANKWICH, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed November 20, 1954, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is denied.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

DEFINITIONS

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date

of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section

or of any regulation or order thereunder, knowing such statement, report, or record to ~~be false in a~~ material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. 251 *et seq.*:

SEC. 4.

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the

time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargainjng representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or

postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

Compare:

SEC. 2. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to [May 14, 1947], except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

Extract from the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*):

SEC. 3. (o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * * *

SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1955